MARCEL JUDE JOSEPH A

v.

THE MINISTER OF EDUCATION, MALAYSIA

HIGH COURT SABAH & SARAWAK, KOTA KINABALU B
ABDUL RAHMAN SEBLI J
[JUDICIAL REVIEW NO: BKI-25-58/11-2011]
17 FEBRUARY 2012

ADMINISTRATIVE LAW: *Judicial review - Certiorari - Application to quash decision of Federal Government to abolish policy of teaching Science and Mathematics in English - Whether applicant adversely affected by decision - Whether decision justiciable - Whether court could interfere with policy decision of government - Whether application sustainable* C

CIVIL PROCEDURE: *Limitation - Delay - Application for judicial review - Whether valid reason offered for delay - Whether application time barred - Rules of the High Court 1980, O. 53 r. 6* D

CIVIL PROCEDURE: *Parties - Amendment - Amendment to add new parties - Whether to be allowed - Whether application fell under purview of High Court judge - Whether Senior Assistant Registrar had jurisdiction to hear application for amendment - Whether order to add new parties regularly obtained - Rules of the High Court 1980, O. 53 r. 3(2)* E

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The application here was to compel the Minister of Education to reinstate the policy of teaching Science and Mathematics in the English language ('PPSMI') in the State of Sabah. The Federal Government had decided to discontinue the policy in 2009 and with the decision, the medium of instruction for the two subjects G in all schools throughout Malaysia reverted back to the Malay language. The applicant, a lawyer, was representing himself in the present application which was made pursuant to O. 53 r. 3(2) of the Rules of the High Court 1980 ('RHC'). The applicant subsequently obtained an order to amend the application for leave, H *inter alia*, to include a second applicant, Evelyn binti Charlie, a teacher; and a second respondent, the Ministry of Education as parties to the application, to file the statement of facts and the affidavit in support of the second applicant and to amend the applicant's own statement of facts. I

Held (dismissing the application with costs):

(1) While an amendment may be made to the statement of facts pursuant to O. 53 r. 3(2) of the RHC, the applicant could not, under the guise of amendment, add new parties to the application. Moreover, the Senior Assistant Registrar had no jurisdiction to hear the application for amendment as such an application comes under the purview of the High Court judge. Hence, the order allowing the inclusion of Evelyn and the Ministry as parties to the action, as well as the order allowing the amendment to the applicant's statements of facts were obtained irregularly. In the circumstances, the orders were set aside. (paras 5-8)

(2) It is a requirement under O. 53 r. 2(4) of the RHC that only persons who are adversely affected by the decision of the public authority are entitled to make the application. In the instant case, the applicant had failed to show in what manner he was adversely affected by the decision of the respondent to abolish the PPSMI. The applicant had also failed to state the reliefs that he was seeking in his statement of facts, which amounted to a serious breach of O. 53 r. 3(2) of the RHC. (para 10)

(3) Further, the applicant had failed to make the application within the time prescribed by O. 53 r. 6 of the RHC. No application for abridgment of time was made by the applicant and neither was any valid reason offered for the delay. The application was therefore time barred and as such the court had no jurisdiction to grant leave. (para 10)

(4) The decision by the respondent to abolish the PPSMI was a non-justiciable decision and was not capable of judicial determination. Its resolution is beyond the institutional competence of the court and would involve the court stepping outside its appropriate constitutional role. Hence, it was not for the court to interfere with the decision of the Government, as it was clearly a policy decision undertaken by the Government based on the exercise of function by the respondent as the Minister of Education. As such the applicant had no legal right to compel the respondent to continue with the implementation of the PPSMI in the State of Sabah. (para 10).

Case(s) referred to:

Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 5 CLJ 865 FC ***(refd)***

Association of Bank Officers, Peninsular Malaysia v. Malayan Commercial Banks Association [1990] 2 CLJ 734; [1990] 1 CLJ (Rep) 33 FC ***(refd)***

Eu Finance Berhad v. Lim Yoke Foo [1982] 1 LNS 21 FC ***(refd)***

Government of Malaysia v. Lim Kit Siang & Another Case [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63 SC ***(refd)***

Koon Hoi Chow v. Pretam Singh [1972] 1 LNS 56 HC ***(refd)***

Menteri Besar Negeri Pahang Darul Makmur v. Seruan Gemilang Makmur Sdn Bhd [2010] 5 CLJ 123 CA ***(refd)***

Mersing Omnibus Co Sdn Bhd v. The Minister of Labour & Manpower & Anor [1983] 2 CLJ 7; [1983] CLJ (Rep) 266 FC ***(refd)***

Semantan Estate [1952] Sdn Bhd v. Collector of Land Revenue Wilayah Persekutuan [1987] 2 CLJ 199; [1987] CLJ (Rep) 329 SC ***(refd)***

Theien Tham Sang v. The United States Army Medical Research Unit & Anor [1982] CLJ 500; [1982] CLJ (Rep) 820 HC ***(refd)***

Tuan Haji Sarip Hamid & Anor v. Patco Malaysia Berhad [1995] 3 CLJ 627 SC ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 32 r. 9, O. 53 rr. 2(4), 3(2), 7(1), O. 53 r. 3(6)

Specific Relief Act 1950, s. 44(1)(a)

For the applicant - In person
For the respondent - Shamsul Bolhassan (Nuraini Azmi FC with him) SFCs

Reported by Shankar Krishna

JUDGMENT

Abdul Rahman Sebli J:

[1] This application for leave to move for judicial review is to seek for the following reliefs:

(a) An order of *certiorari* in so far as the State of Sabah is concerned to quash the decision of the respondent to abolish the Pengajaran dan Pembelajaran Sains dan Matematik dalam Bahasa Inggeris ("PPSMI");

(b) An order of *mandamus* to the respondent in so far as the State of Sabah is concerned to continue implementation of PPSMI in the State of Sabah;

A (c) An order of prohibition to the respondent from abolishing the PPSMI in the State of Sabah;

(d) A declaration in so far as the State of Sabah is concerned that the decision by the respondent to abolish the PPSMI in the
B State of Sabah is *ultra vires* and unlawful;

(e) Any other relief deemed fit by the court.

[2] In pith and substance the intended application is to compel the Minister of Education to reinstate the policy of teaching
C science and mathematics in the English language in the State of Sabah which the Federal Government had decided to discontinue in 2009. With the decision, the medium of instruction for these two subjects in all schools throughout Malaysia reverts back to the Malay language. Although not stated in the application, it is
D common knowledge that the applicant is a lawyer actively practising in the High Court of Sabah and Sarawak at Kota Kinabalu. He is representing himself in the present application.

[3] The application is supported by the applicant's statement of
E facts made pursuant to O. 53 r. 3(2) of the Rules of the High Court, 1980 ("the Rules") and his affidavit in support affirmed on 11 November 2011. On 6 January 2012, the applicant applied for and obtained an order from the Senior Assistant Registrar to amend the application for leave in the following terms:

F (1) To include a second applicant, one Evelyn Binti Charlie a.k.a. Madam Eve ("Evelyn") who is a teacher at SK Stella Maris, Tanjung Aru, Kota Kinabalu and a second respondent, the Ministry of Education ("the Ministry") as parties to the application.
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(2) To file the statement of facts and the affidavit in support of the second applicant.

(3) To amend the applicant's own statement of facts by inserting
H the reliefs sought which he omitted to do earlier.

[4] The application was made *ex parte* to the Senior Assistant Registrar, meaning to say it was made in the absence of the respondent or his counsel. According to the learned Senior
I Federal Counsel he only came to know of the amendments the day before the hearing of the present application. Thus, at the

outset of the hearing for leave on 11 January 2012, the learned Senior Federal Counsel objected to the inclusion of Evelyn and the Ministry as parties to the application as well as to the amendment made to the applicant's statement of facts. It is significant to note that Evelyn did not apply to be added as a party. She was added as a party by the applicant through his application to amend his statement of facts.

[5] In my view, the point was validly taken by the learned Senior Federal Counsel that while an amendment may be made to the statement of facts made pursuant to O. 53 r. 3(2) of the Rules the applicant cannot, under the guise of amendment, add new parties to the application. More importantly, the Senior Assistant Registrar had no jurisdiction to hear the application for amendment as such application comes under the purview of the High Court judge: see O. 53 r. 7(1) of the Rules which provides as follows:

> The Judge may allow the statement to be amended, and may allow further affidavits to be used if they deal with new matters arising out of any affidavit of any other party to the applications and where the applicant intends to amend his statement or use further affidavits, he must immediately give notice of his intention and of any proposed amendment of his statement to every other party.

[6] I cannot accede to the applicant's argument that O. 32 r. 9 of the Rules empowers the Senior Assistant Registrar to order the amendments. The use of the words "the judge" rather than "the High Court" in O. 53 r. 7(1) signifies that the power is vested in a High Court judge and not a Senior Assistant Registrar. Therefore, the order allowing the inclusion of Evelyn and the Ministry as parties to the action was obtained irregularly. So is the order granting leave to the applicant to amend his statement of facts.

[7] An order that has been obtained irregularly is not a valid order and is liable to be set aside without the necessity of going through the appeal process. A null and void order is as good as no order at all and is subject to a collateral attack: see *Eu Finance Berhad v. Lim Yoke Foo* [1982] 1 LNS 21 FC.

[8] In the circumstances, the order to add Evelyn and the Ministry as parties to the application and the order allowing amendment to the applicant's statement of facts are set aside. Thus the only parties to the application are the original parties, namely Marcel Jude Joseph and the Minister of Education, Ministry of Education, Malaysia.

[9] In an application for judicial review, the guiding principles ought to be that the applicant must show *prima facie* that the application is not frivolous or vexatious and that there is some substance in the grounds supporting the application: see *Association of Bank Officers, Peninsular Malaysia v. Malayan Commercial Banks Association* [1990] 2 CLJ 734; [1990] 1 CLJ (Rep) 33 FC. In *Tuan Haji Sarip Hamid & Anor v. Patco Malaysia Berhad* [1995] 3 CLJ 627 it was held by the Federal Court that if the judge is satisfied that there is no arguable case he should dismiss the application for leave.

[10] I have gone through the applicant's affidavit in support and the arguments of both sides carefully and I am satisfied that there is no case fit for further consideration to warrant the grant of leave, for the following reasons:

(1) The applicant fails to bring his case within the purview of s. 44(1)(a) of the Specific Relief Act 1950 in that he fails to show how his personal right would be injured if the orders he is seeking are not granted by the court. There is nothing in his affidavit affirming to this fact. In this connection it is apt to refer to the judgment of Hashim Yeop A Sani J (as he then was) in *Theien Tham Sang v. The United States Army Medical Research Unit & Anor* [1982] CLJ 500; [1982] CLJ (Rep) 820 where His Lordship said at p. 823:

> Under proviso (a) of section 44(1), the applicant had to show his personal right would be injured if the order is not made by the court. Nowhere in the affidavit of the applicant here was it stated that he had such personal right or that the personal right would be injured if the order was not given.

(2) Further, it is a requirement under O. 53 r. 2(4) of the Rules of the High Court 1980 that only persons who are adversely affected by the decision of the public authority are entitled to make the application. The order provides as follows:

> Any person who is **adversely affected by the decision** of any public authority shall be entitled to make the application. (emphasis added)

The rule is therefore clear. Anyone who wants to apply for judicial review must first show that he is adversely affected by the decision of the public authority. In the present case, the applicant fails to show in what manner he is adversely affected by the decision of the respondent to abolish the PPSMI. He merely states that he is involved in the field of education by virtue of being the Deputy President of the Association of Ex-Students of La-Salle & Sacred Heart which has among its objectives the provision of material as well as organisational support for La Salle & Sacred Heart School and the undertaking of civic action. This is hardly sufficient to establish adverse effect. He therefore lacks the *locus standi* to institute the present application.

The issue of *locus standi* in an application for *mandamus* was considered by the Supreme Court in *Semantan Estate [1952] Sdn Bhd v. Collector of Land Revenue Wilayah Persekutuan* [1987] 2 CLJ 199; [1987] CLJ (Rep) 329 where Lee Hun Hoe CJ (Borneo) said at p. 334:

> Then there is the important question of the appellant's standing. He must have a specific legal right to ask the Court to exercise its discretion to issue the order of *mandamus*. Such discretion must be exercised judicially. If the appellant has no such right then he is not entitled to *mandamus*.

In *Koon Hoi Chow v. Pretam Singh* [1972] 1 LNS 56 it was held by Sharma J that the applicant must show not only that he has a legal right to have the act performed but that the right is so clear and well defined as to be free from any reasonable controversy. The learned judge went on to hold that the order of *mandamus* cannot issue when the right is doubtful, or is a qualified one or where it depends upon an issue of fact to be determined by the respondent.

(3) The applicant fails to state the reliefs that he is seeking for in his statement of facts. This is a serious breach of O. 53 r. 3(2) of the Rules which stipulates as follows:

> An application for leave must be made *ex parte* to a Judge in Chambers and must be supported by a statement setting out the name and description of the applicant, the reliefs sought and the grounds on which it is sought, and by affidavit verifying the facts relied on.

(4) The applicant claims to be the Deputy President of the Association of Ex-Students of La Salle & Sacred Heart but fails to support his claim with documentary evidence. The Articles and Memorandum of Association of the Ex Students of La-Salle & Sacred Heart were not produced, nor the minutes of the Association's meetings. The inclusion of these documents is important to establish the applicant's standing in instituting the present action.

(5) The applicant failed to make the application within the time prescribed by O. 53 r. 3(6) of the Rules, ie, within 40 days from the date the Cabinet decided to abolish the PPSMI. For ease of reference O. 53 r. 3(6) is reproduced below:

> An application for judicial review shall be made promptly and in any event within 40 days from the date when the grounds for the application first arose or when the decision is firstly communicated to the applicant provided the Court may, upon application and if it considers that there is a good reason for doing so, extend the period of 40 days.

The Cabinet decision was made on 8 July 2009 and the present application was only made on 11 November 2011, a delay of two years three months and two days. No application for abridgment of time was made by the applicant and neither has any valid reason been offered to explain the delay. The application is therefore time barred and as such the court has no jurisdiction to grant leave: see *Mersing Omnibus Co Sdn Bhd v. The Minister of Labour & Manpower & Anor* [1983] 2 CLJ 7; [1983] CLJ (Rep) 266 FC; *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865 FC; *Menteri Besar Negeri Pahang Darul Makmur v. Seruan Gemilang Makmur Sdn Bhd* [2010] 5 CLJ 123 CA.

(6) The decision by the respondent to abolish the PPSMI is a non-justiciable decision and is not capable of judicial determination. The litigation process and the expertise of the

court are not suited for resolving the question in hand: see *De Smith's Judicial Review* (6th edn). Its resolution is beyond the institutional competence of the court and would involve the court stepping outside its appropriate constitutional role: see *The Concept of 'Justiciability' in Administrative Law in Groves & Lee, Australian Administrative Law (2007)*.

(7) It is not for the court to interfere with the decision of the Government because the wisdom and policy decision of the Government belongs to the Government. The court cannot tell the public authority how to exercise its power: see *Government of Malaysia v. Lim Kit Siang & Another Case* [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63. The decision to abolish the PPSMI was clearly a policy decision undertaken by the Government based on the exercise of function by the respondent as Minister of Education and as such the applicant has no legal right to compel the respondent to continue with the implementation of the PPSMI in the State of Sabah.

[11] In short the application for leave is frivolous and lacks substance. It does not justify further argument on a substantive motion. In the circumstances, the application is dismissed with costs.